NOTE

BEYOND THE PLENARY POWER DOCTRINE: HOW CRITICAL RACE THEORY CAN HELP MOVE US PAST THE *CHINESE EXCLUSION CASE*

FREDDY FUNES*

So act as to treat humanity, whether in thine own person or in that of any other, in every case as an end withal, never as means only.[1]

I. INTRODUCTION

Racism and hatred permeate the United States' immigration history. From the Know-Nothing Party to California's Proposition 187, the U.S. population manifests its hardships and fears in explicit racism. Despite this truth, in the immigration context, the judiciary applies an extremely lenient standard of review. This doctrine, called the plenary power doc-

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1. IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSICS OF MORALS 32 (Thomas Kingsman Abbott trans., MacMillan 1985) (1785).

trine, essentially abdicates judicial responsibility for the legislature and executive branches' decisions to exclude aliens.

In few areas does Critical Race Theory (CRT) give as much insight as it does in analyzing the plenary power doctrine? CRT encompasses the belief that society, and not biology or some inherent, natural order, creates racial and ethnic characteristics. Interestingly, this socially constructed categorization reflects a balance of power where a select few "races" dominate the other "races." This interplay of categories and domination blossoms in immigration. For example, when in need of cheap labor, the United States opens its border, either de jure or de facto. When the economy struggles, the United States reacts with racist violence and evicts, bars, and vilifies the aliens. CRT helps explain this American phenomenon.

This Note argues that the judiciary's implementation of the plenary power doctrine fails to reflect reality. Applying the tools of CRT and focusing on immigration by Asians and Latinos,[2] this Note highlights the historically discriminatory records of the United States' legislative and the executive branches in immigration. Intriguingly, a pattern emerges. The United States endorses minority immigration when economic exigency exists. When the exigency dematerializes, racial tension explodes, and the United States applies cruel and discriminatory laws to expel humans who sacrificed much to work in the United States.

Then, this Note contrasts the racist, historical record with the constitutional freedom that the courts grants the legislative and executive branches. While the legislative and executive branches discriminate, the courts idly stand by, rationalizing ways to give deference. But these rationalizations lack merit, have no link to reality, and rely on circular logic. Due to these precarious foundations, this Note questions the value of keeping the plenary power doctrine. Beyond this, however, this Note argues that CRT is critical to ending this abusive cycle.

Part II highlights the historical discrimination faced by Asian-Americans and Latinos and, via the interest-convergence principle, explains the increases in immigration and the backlashes that followed those increases. Part II also explains the plenary power doctrine and exhibits some of the doctrine's effects on aliens. Part III argues that the plenary power doctrine lacks substance by highlighting the weakness of the plenary power doctrine's rationale and explaining why any useful analysis of immigration law needs CRT. Part IV concludes by offering a few possible remedies to the current tragedy created by the plenary power doctrine.

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2. For convenience, the term "Latino" describes both male and female Latinos and Latinas.

II. A NATION OF (MISTREATED) IMMIGRANTS

In the past, aliens in the United States faced nativist attitudes and discriminatory laws. Employers urged a free-flow of cheap labor. These nativist attitudes and discriminatory laws gave an avenue for frustrated American laborers who saw their wages decline under competition from aliens.[3] The attitudes and laws further constrained aliens to the most menial of jobs, protecting labor interests in better paying jobs. When the employer no longer needed the cheap labor, business no longer attempted to protect the free-flow of cheap labor, and the United States government removed the aliens and closed paths to legal immigration.[4] Notwithstanding this history, the Supreme Court abdicated any responsibility over the actions taken by the political branches in immigration.

A. *A Short Sample of Immigration History*

By any account, the United States' treatment of aliens has been hideous. By the standards of an allegedly liberal democracy, this treatment has also been hypocritical. At best, one could call this treatment opportunistic. When the United States businesses needed cheap labor, the United States government opened its arms to foreigners. Once the economy struggled, the United States' population and government attacked, disgraced, and vilified those very same foreigners. Two periods in immigration highlight this hideousness: (1) Chinese immigration in the 1800s; and (2) the Bracero Program.

1. The Chinese, California, and the Exclusion Act

California only had 4000 Chinese aliens within its borders in 1850.[5] After the California Gold Rush, Chinese aliens arrived in the United States in considerable numbers.[6] The California Gold Rush and the need for laborers by railroads pulled Chinese aliens, and, at first, Californians wel-

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3. *But see generally* JULIAN L. SIMON, HOW DO IMMIGRANTS AFFECT US ECONOMICALLY? (1985) (arguing that immigration does not have a statistically significant effect on aggregate employment and wages).

4. William F. Shugart II, Robert D. Tollison & Mwangi S. Kimenyi, *The Political Economy of Immigration Restrictions*, 4 YALE J. ON REG. 79, 91 (1986) (finding that the correlation of increased deportation of aliens during times of wage declines "supports the theory that the immigration authorities use deportations to transfer wealth, mitigating downward or upward pressure on wages").

5. WILLIAM L. TUNG, THE CHINESE IN AMERICA 1820-1973, at 8 (1974).

6. *See* ERIKA LEE, AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1820-1943, at 25 (2003) (explaining how the racial hostilities, suffered by Chinese immigrants, were the product of American Orientalist ideology).

comed the Chinese aliens.[7] "With the lack of labor generally, and especially the lack of women on the western frontier, [Chinese aliens] found work in the mines, building the railroads, as ranch hands, farm laborers, and domestic servants."[8] An ephemeral phenomenon, the welcome soon dematerialized. Nonetheless, business interest and labor need pulled Chinese aliens into the United States.

From the beginning, Chinese aliens faced discrimination. Even as early as 1853, the California legislature passed protectionist measures against the Chinese. For example, in 1853, the California legislature imposed a tax on foreign miners. Of course, at the time, Chinese aliens constituted the bulk of foreign miners.[9] Similarly, in 1858, the California legislature passed an act that barred further immigration by "Chinese or Mongolians."[10] And the judiciary, unwilling to give the legislature a monopoly on discrimination, also discriminated against the Chinese aliens. The Supreme Court of California, in *People v. Hall*, held that the Chinese could not testify against Whites.[11] The defendant in *Hall* had murdered a Chinese alien. Relying on the testimony of three Chinese witnesses, a jury had found the defendant, Hall, guilty of murdering the Chinese alien.[12] The California Supreme Court held that the word "Black" under a California statute that prevented Blacks from testifying against Whites included Asians[13] and overturned Hall's conviction.[14] Therefore, after *Hall*, Whites could commit crimes against Chinese aliens with impunity, since the Chinese aliens could not testify against the White aggressors.

Nevertheless, while nativist, these laws reflect more a restriction on trade and a stabilization of labor force than an attempt to remove the already-settled Chinese. By imposing a tax on foreign miners, the White

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7. *See* MICHAEL C. LEMAY, GUARDING THE GATES: IMMIGRATION AND NATIONAL SECURITY 54 (2006).

8. *Id.*

9. WILLIAM L. TUNG, THE CHINESE IN AMERICA 1820-1973, at 8 (1974).

10. An Act To Prevent the Further Immigration of Chinese or Mongolians to the State, ch. 529, 1858 Cal. Stat. 295 (repealed 1955); *see* WILLIAM L. TUNG, THE CHINESE IN AMERICA 1820-1973, at 53 (1974).

11. 4 Cal. 399, 405 (1854). The Supreme Court of California, by restricting the ability of Chinese to testify, did not wish to extend to Chinese "the further privilege of participating with [Whites] in administering the affairs of our government." *Id.*

12. John Copeland Nagle, *The Worst Statutory Interpretation Case in History*, 94 NW. U.L. REV. 1445, 1460 (2000) (book review). Hall appealed his conviction on grounds that the three Chinese witnesses "were barred from testifying by the 1850 criminal proceedings statute," despite not objecting to those witnesses' testimony at trial. *Id.*

13. *Hall*, 4 Cal. at 404 ("The word 'white' has a distinct signification, which *ex vi termini*, excludes black, yellow, and all other colors.").

14. *See* John Copeland Nagle, *The Worst Statutory Interpretation Case in History*, 94 NW. U.L. REV. 1445, 1460 (2000) (book review) (outlining the court's reasoning in finding that "Chinese are 'Indians' within the meaning of the [1850] statute").

majority obtained dominance over the higher-paying jobs. Moreover, by attempting to restrict immigration, the California legislature attempted to keep the secondary labor force at its 1858 levels. The *Hall* opinion made Chinese aliens second-class citizens, but the Chinese labor still existed for use by the railroads.

Beyond governmental discrimination, however, Chinese aliens faced violent actions by Americans. Twenty-one Chinese aliens died in an 1871 Los Angeles riot, and Denver was the site of an anti-Chinese riot in 1880.[15] In Wyoming, a mob killed twenty-eight Chinese miners, and in Tacoma, Washington, Whites drove hundreds of Chinese workers from their homes.[16] Still, despite the discrimination, violence, and hardship and despite the American population's antipathy towards the Chinese aliens, the United States government did not outlaw Chinese immigration in the 1850s, 60s, or 70s. To answer why the United States government never did so, one must first understand the interest-convergence principle.

As originally formulated, the interest-convergence principle holds that "[t]he interest of [B]lacks in achieving racial equality will be accommodated only when it converges with the interests of [W]hites."[17] In the immigration context, the principle can be restated to encompass the notion that the United States will allow aliens to immigrate when necessary to obtain cheap labor for the production of certain cheap goods. But, of course, the principle does not stop there. The principle has a corollary: When the necessity for cheap labor dissipates, the United States government's open-gate policy dissipates as well. Moreover, because it benefits business and the population that the cheap labor stay in dangerous and low-paying jobs, the American population will discriminate, harass, and vilify the alien population.[18] By creating a second-class workforce, busi-

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15. MICHAEL C. LEMAY, GUARDING THE GATES: IMMIGRATION AND NATIONAL SECURITY 56 (2006); Kris Song, Comment, *The Present Contours of Asian American Legal Scholarship: Its Themes, Objectives, and the Search for an Asian American Legal Perspective*, 9 ASIAN PAC. AM. L.J. 83, 91 (2004).

16. THOMAS A. ALIENIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 171 (5th ed. 2003); MICHAEL C. LEMAY, GUARDING THE GATES: IMMIGRATION AND NATIONAL SECURITY 56 (2006).

17. Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

18. *See* Sylvia R. Lazos Vargas, *Deconstructing Homo[generous] Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect*, 72 TUL. L. REV. 1493, 1502 (1998) (showing that the American population has a designated set of values and looks down on people that have yet to acquire the "American way," which usually ends up being the immigrant population that is deemed as "different").

> The White ethnic immigrant myth—that hard work, assimilation, and virtue can overcome any adversity, including racism—has become the dominant American cultural

nesses have a large supply of cheap labor. By allowing Whites to vilify and attack aliens, the aliens take the venom created by class tensions.

Despite the violence and discrimination, by 1851, 25,000 Chinese aliens lived in California, and another 13,000 Chinese aliens entered the United States in 1854.[19] The 1860 census estimated 34,933 Chinese living in the United States,[20] and, again, the need for labor dictated this immigration pattern. Indeed, in 1865, the Central Pacific Railroad began recruiting Chinese laborers. At first, the Central Pacific Railroad recruited the Chinese laborers from California, but, eventually, the recruitment expanded to Kwangtung, China.[21] The Central Pacific Railroad, in fact, employed nearly 9000 Chinese aliens a year.[22] And, at the last stage of the construction of the Central Pacific Railroad, "Chinese labor constituted [ninety] percent of the working force."[23] Finally, between 1870 and 1880, 138,941 Chinese aliens entered the United States.[24]

Eventually, the Central Pacific Railroad no longer needed cheap labor, and the United States government swiftly closed the gates. "[W]ith the completion of the transcontinental railroad in 1869 and the economic depression of 1873, pressure mounted on Congress to restrict immigration."[25] This depression agitated Whites' fear of economic competition from Chinese immigrant labor.[26] Nativist agitation against the Chinese aliens increased in the 1870s and 1880s.[27]

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narrative. The White ethnic immigrant myth is hegemonic because it mandates assimilation, dismisses the power and subordination dynamics of racism, demands conformity with "American values," and ultimately constructs a racial/cultural binary that pits the virtuous White assimilated ethnics against the nonvirtuous "raced" and the culturally different. *Id.*

19. WILLIAM L. TUNG, THE CHINESE IN AMERICA 1820-1973, at 8–9 (1974).

20. *Id.*

21. *Id.* at 11.

22. MICHAEL C. LEMAY, GUARDING THE GATES: IMMIGRATION AND NATIONAL SECURITY 54 (2006).

23. WILLIAM L. TUNG, THE CHINESE IN AMERICA 1820-1973, at 12 (1974).

24. ERIKA LEE, AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1820-1943, at 25 (2003) (discussing how Chinese immigration, particularly during 1870 to 1880, compromised a small percentage of the total immigrant population entering the United States). "Most came from the Pearl River delta region in Guangdong, China, and, like the majority of newcomers to California, the Chinese community was comprised mostly of male laborers." *Id.*

25. Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The "Plenary Power" Justification for On-Going Abuses of Human Rights,* 10 ASIAN L.J. 13, 14 (2003) ("In 1882 legislation was passed suspending the immigration of new Chinese laborers for ten years.").

26. *See* MICHAEL C. LEMAY, GUARDING THE GATES: IMMIGRATION AND NATIONAL SECURITY 55 (2006).

27. *See* BRIAN N. FRY, NATIVISM AND IMMIGRATION: REGULATING THE AMERICAN DREAM 43 (2007) (contrasting American attitudes towards Chinese immigrants with their

After the completion of the Central Pacific Railroad and after an economic depression, the United States government reacted to the nativist calls for limits on immigration. In 1875, Congress passed an act that limited the immigration of prostitutes.[28] A seemingly respectable law, the law ignominiously stereotyped all Chinese women as prostitutes.[29] Finally, in 1882, because of "fear[s] of declining job opportunities for Americans combined with racial and ethnic prejudice,"[30] the United States government barred any Chinese laborer from entering the United States.[31] Hence, once American businesses no longer needed a cheap labor pool because of a stagnant economy, the United States responded to what it had ignored for years—nativist sentiments. Once the economic advantages of Chinese immigration disappeared, Chinese immigration disappeared, too.

2. The Bracero Program and Labor Shortages

Similar to the story of the Chinese aliens in the 1800s, the Bracero Program highlights the United States government's willingness to open the immigration gate when the economy needed cheap labor and close the immigration gate when economic necessity vanished. But, unlike the story of Chinese aliens in the 1800s, the United States government directly controlled and shaped the Bracero Program.

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attitudes against European immigrants during that time period). "[N]o 'variety of anti-European sentiment has ever approached the violent extremes to which anti-Chinese agitation went in the 1870's and 1880's.'" *Id.* This notion was realized by legislation aimed at preventing Chinese from coming to America and becoming United States citizens. *Id.* "[I]n 1882 the Chinese Exclusion Act suspended almost all Chinese immigration and also barred foreign-born Chinese from naturalizing, thereby creating the infamous category 'aliens ineligible for citizenship.'" *Id.* Unfortunately, it was not until 1943 that the Act was repealed due to the American alliance with China during World War II. *Id.*

28. Act of Mar. 3, 1875, ch. 141, § 3, 18 Stat. 477, 477.

29. NATSU TAYLOR SAITO, FROM CHINESE EXCLUSION TO GUANTÁNAMO BAY: PLENARY POWER AND THE PREROGATIVE STATE 17 (2007).

30. HELENE HAYES, U.S. IMMIGRATION POLICY AND THE UNDOCUMENTED 12 (2001).

31. Chinese Exclusion Act of May 6, 1882, ch. 126, 22 Stat. 58, 58–59 (1882).

> Whereas, in the opinion of the Government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof: Therefore,
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> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, [t]hat from and after the expiration of ninety days next after the passage of this act, and until the expiration of ten years next after the passage of this act, the coming of Chinese laborers to the United States be, and the same is hereby, suspended; and during such suspension it shall not be lawful for any Chinese laborer to come, or, having so come after the expiration of said ninety days, to remain within the United States. *Id.*

In 1940, with a global war looming, California, Texas, and Arizona farmers clamored over labor shortages. After the attack on Pearl Harbor, the Immigration and Naturalization Service (INS) listened.[32] By 1942, the United States and Mexico had entered into an agreement, under which Mexican agricultural laborers could work seasonally on United States farms.[33] This program lasted, on and off, until 1964 and admitted four to five million Mexican workers.[34] These Mexican laborers "were the perfect exploitable underclass, willing to work for low wages and in deplorable conditions."[35]

From the beginning, the Bracero Program "facilitated an uninterrupted demand-based flow" of cheap labor.[36] The program highlights the idea that "business interests have frequently opposed immigration restrictions and thus, at times, taken a position that may be described as pro-immigrant to ensure a cheap labor force."[37] To this business end, the Bracero Program flourished. From 1942 to 1947, the Bracero Program allowed 200,000 Mexican aliens to enter the United States as agricultural workers.[38] Similarly, from 1948 to 1950, over 200,000 Mexican aliens legally entered the United States as agricultural workers.[39] At the same time, 400,000 Mexican aliens "illegally" entered the United States as agricultural workers.[40] Assuming that this wave of undocumented immigration undermined the Bracero Program's success misjudges the power of economic interests.

The illegal immigration of the Mexican laborers did not grow against the Bracero Program, but instead grew as a supplement to the Bracero Program. "[T]he increase in illegal immigration was . . . encouraged by

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32. *See* KITTY CALAVITA, INSIDE THE STATE: THE BRACERO Program, IMMIGRATION, AND THE I.N.S. 18 (1992); HELENE HAYES, U.S. IMMIGRATION POLICY AND THE UNDOCUMENTED 29 (2001).

33. *See* RICHARD B. CRAIG, THE BRACERO PROGRAM: INTEREST GROUPS AND FOREIGN POLICY 36–37 (1971) ("As a result of severe wartime labor shortages, the United States concluded with Mexico on August 4, 1942, an intergovernmental agreement for the use of Mexican agricultural labor on United States farms.").

34. HELENE HAYES, U.S. IMMIGRATION POLICY AND THE UNDOCUMENTED 29 (2001).

35. Ruben J. Garcia, Comment, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118, 127 (1995).

36. RICHARD B. CRAIG, THE BRACERO PROGRAM: INTEREST GROUPS AND FOREIGN POLICY 7 (1971).

37. Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525, 544.

38. RICHARD B. CRAIG, THE BRACERO PROGRAM: INTEREST GROUPS AND FOREIGN POLICY 50 (1971). Although these farm workers were located in twenty-four states, the "vast majority [were] employed in California." *Id.*

39. *Id.* at 63.

40. *Id.*

INS enforcement policies."[41] Whenever INS officials attempted to deport undocumented Mexican agricultural workers, farmers protested.[42] One example highlights the INS's complicity in illegal immigration. A large number of Mexicans arrived in Juarez, Mexico with the hopes of becoming agricultural workers in the United States. Mexico refused to allow the Mexicans into the Bracero Program, and the INS, under pressure by Texas cotton farmers, opened the gates and allowed the Mexicans, "illegally," into the United States.[43] Indeed, the illegal immigration of Mexican workers became an easier administrative tool for granting farmers cheap labor.

The Bracero Program always consisted of two administrative tools: the bureaucratic, legal system and the surreptitious, illegal system. Both played a critical part, and both helped feed farmers' cheap-labor needs. Thus, by 1950, 67,500 Mexicans had entered the United States via the Bracero Program, and 458,215 Mexicans had entered illegally.[44] The numbers increased in 1952, with 197,000 Mexican agricultural laborers entering through the Bracero Program, and 543,538 Mexican agricultural laborers entering illegally.[45] By 1954, the numbers stood at 309,033 Mexican agricultural laborers entering by the Bracero Program, and 1,075,168 Mexican agricultural laborers entering illegally.[46] The INS finally began to restrict illegal immigration.

Some scholars believe that the INS responded to the high number of undocumented aliens.[47] But, the INS's response resulted not from the number of undocumented aliens but from economic interest. For example, the INS implemented a program with an unbelievable name, Opera-

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41. KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S. 32 (1992).

42. *Id.* at 35.

43. RICHARD B. CRAIG, THE BRACERO PROGRAM: INTEREST GROUPS AND FOREIGN POLICY 69 (1971). During this tense situation, the INS eventually opened the gates for three days and allowed over 4000 undocumented immigrants to enter after receiving pressure from Texas employers, who were waiting to transport these individuals to cotton fields. *Id.*

44. *Id.* at 125–26.

45. *Id.* at 126.

46. *Id.* ("In 1952, the comparative figures were 197,000 braceros and 543,538 [undocumented individuals]. In 1953, the figures were 201,380 and 875,318. By 1954, the figures had become fantastic: 309,033 braceros and 1,075,168 known [undocumented individuals].")

47. *See, e.g., id.* at 126–27 (describing the ever increasing illegal immigrants situation in the early 1950s and its effect on both countries). Specifically, the United States and Mexico blamed each other for the tide of immigrants while others complained of the negative side effects of mass illegal migration. *Id.* These growing concerns and issues helped push a "call to action" in 1954. *Id.*

tion Wetback, in 1954.[48] The program intended to remove the undocumented Mexican laborers.[49] Operation Wetback might seem inconsistent with the agricultural need for cheap labor, but closer examination shows differently. The number of legal Mexican agricultural laborers who entered the United States through the Bracero Program increased during Operation Wetback.[50] In reality, Operation Wetback merely shifted the work force from one based mainly on undocumented Mexican laborers to legal Mexican laborers. And the reason for this shift again accords with the interest-convergence principle and its corollary.

"The long hours, sporadic employment, and arduous working conditions of agricultural production made the retention of workers problematic."[51] As the number of undocumented Mexican laborers increased, so did the mobility of the work force. An undocumented Mexican laborer had no need to stay on any farm and could, instead, attempt to find the best farm to work on. In contrast, the Bracero Program confined a legal Mexican laborer to a specific employer.[52] Hence, by channeling Mexican laborers through mediums that required them to stay on specific farms, Operation Wetback actually cheapened the labor available to farmers. After Operation Wetback, Mexican laborers could not move to a better, higher-paying job.[53] Instead, like the restrictions placed on Chinese aliens in the 1800s, Operation Wetback limited Mexican laborers to unsafe, arduous, and low-paying jobs. Moreover, "[i]f [Mexican laborers] could be counted on at the moment of need and could be coerced not to 'skip,' this highly regulated supply of labor had the additional advantage that once the need had subsided, the workers could be sent home."[54] Therefore, Operation Wetback followed the needs and concerns of agricultural business. Actually, although farmers had repeatedly complained about prior INS attempts to remove undocumented Mexican laborers, farmers acclaimed Operation Wetback.[55]

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48. *See* RICHARD B. CRAIG, THE BRACERO PROGRAM: INTEREST GROUPS AND FOREIGN POLICY 127–28 (1971) (stating that the "call to action" came in 1954 and the operation was titled "Operation Wetback" and General Swing had "full authority" over the operation).

49. *Id.* at 128.

50. *See* KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S. 55 (1992).

51. *Id.* at 56.

52. *See id.*

53. *See id.* at 74 ("[U]sing workers whose legal status was contingent on their staying with one employer would reduce the turnover of workers attracted to better wages or working conditions elsewhere, and ultimately stabilize or even reduce labor costs.").

54. *Id.* at 58.

55. *See* KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S. 59 (1992).

Of course, if the INS did not bring enough legal Mexican laborers into the United States, the labor pool would shrink. Consequently, labor prices would increase, defeating the goal of the Bracero Program. As such, INS reports after Operation Wetback show incredibly detailed calculations on the supply and demand of agricultural labor.[56] This, of course, follows from the INS's attempts to tailor immigration policy to follow agricultural needs.

Eventually, the program ceased to exist. But, again, the interests controlling the end of the program emerge from farmers' interests. For instance, in 1951, machinery harvested only eight percent of cotton crops.[57] In contrast, the year the Bracero Program ended, machinery harvested seventy-eight percent of cotton crops.[58] In essence, the Bracero Program died when farmers no longer needed a large, governmentally administered, Mexican-laborer program. Once the farmers' interests no longer coincided with Mexican aliens' needs, the United States government unilaterally ignored Mexican aliens' needs.

B. *The Plenary Power Doctrine: Fictional Sovereignty*

The plenary power doctrine's birth underscores the racism that permeates its application. The plenary power doctrine states "that in . . . immigration law the courts will not intervene because Congress and the executive . . . have complete power."[59] "[W]hen the plenary power doctrine is invoked, the courts will not intervene to enforce otherwise applicable guarantees of the Constitution."[60] The *Chinese Exclusion Case*[61] gave birth to the plenary power doctrine. Essentially, the *Chinese Exclusion Case* concerns outright discrimination, which the Supreme Court itself concedes.[62] In the *Chinese Exclusion Case*, a Chinese laborer who had lived for roughly twelve years in San Francisco, traveled to China with a certificate that entitled him to enter the United States.[63] In his

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56. *See id.* at 82.

57. *Id.* at 143.

58. *Id.* at 144.

59. Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The "Plenary Power" Justification for On-Going Abuses of Human Rights,* 10 ASIAN L.J. 13, 14 (2003).

60. NATSU TAYLOR SAITO, FROM CHINESE EXCLUSION TO GUANTÁNAMO BAY: PLENARY POWER AND THE PREROGATIVE STATE 5 (2007).

61. 130 U.S. 581, 609 (1889).

62. *Id.* at 603 (intimating that, though the so-called Chinese Exclusion Act and its amendments, excluding all Chinese workers from entering or re-entering the United States for a period of ten years on penalty of imprisonment and/or deportation, is a lawful exercise of Congress's constitutional power to control immigration, it may not be a moral exercise of that power).

63. *Id.* at 582.

absence, the United States had passed the racist Chinese Exclusion Act,[64] which barred the entrance of Chinese laborers into the United States, notwithstanding any certificate in the Chinese laborers' possessions.[65] Hence, when the Chinese alien attempted to reenter the United States, the United States prevented his admission.[66]

The Court took this factual situation to ask the following: "There being nothing in the treaties between China and the United States to impair the validity of the act of Congress of October 1, 1888, was it on any other ground beyond the competency of Congress to pass it?"[67] The question sounds innocuous, but, in reality, the Court asked whether Congress violated the Constitution by passing the Chinese Exclusion Act.

The Court held that, although the federal government cannot deprive "any person . . . of life, liberty, or property, without due process of law,"[68] the exclusion decisions of the legislative branch bound the judiciary.[69]

However, the Supreme Court itself recognizes the racist rationale behind the Chinese Exclusion Act, and, in fact, the legislative history of the Act could lead to no other conclusion but that Congress based the Act on racial animus. In the legislative history, Senators and Representatives described Chinese aliens as incapable of assimilating, as causing moral degradation, as incapable of appreciating freedom, and as stealing spots from "honest" White aliens.[70] The Court followed Congress's lead.

The Court first recognized that the Chinese migrated to the United States, usually under contract, for employers "for whose benefit they worked."[71] The Court recognized the aliens' diligence.[72] Nonetheless, the cheap, diligent labor irritated Americans, and, to state it as euphemis-

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64. Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504 (1888) (excluding people from China from the United States).

> [F]rom and after the passage of this act, it shall be unlawful for any [C]hinese laborer who shall at any time heretofore have been, or who may now or hereafter be, a resident within the United States, and who shall have departed, or shall depart, therefrom, and shall not have returned before the passage of this act, to return to, or remain in, the United States. *Id.* at 504.

65. *Chinese Exclusion Case*, 130 U.S. at 599 (quoting the text of the amended Chinese Exclusion Act).

66. *Id.* at 589 (describing Ping's arrival at the Port of San Francisco, where he was refused entry solely based on the amendment to the Chinese Exclusion Act and later detained by the captain of the steam ship on which he arrived).

67. *Id.* at 603.

68. U.S. CONST. amend. V.

69. *Chinese Exclusion Case*, 130 U.S. at 606.

70. Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 28, 29 n.155, 30 (1998).

71. *Chinese Exclusion Case*, 130 U.S. at 594. The first wave of immigrants readily found gainful employment, worked in various industries for low wages, and was generally unopposed by Americans. *Id.* However, as more Chinese arrived and began replacing

tically as the Court did, "[t]he differences of race added greatly to the difficulties of the situation."[73] The Court, unwilling to simply describe the xenophobic, racist nature of the population, partook in the racism. For the Court, the Chinese would overrun the United States and "remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country."[74]

In the *Chinese Exclusion Case*, the Court never hid the true reasons behind the immigration bar on Chinese laborers. Nonetheless, the Court understood that blatant racism could not solely underlie the rationale of the plenary power doctrine. Because of this realization, the Court looked to sovereignty, national security, and self-definition of the political community.

The Court first noted that every independent nation has "[j]urisdiction over its own territory."[75] The United States is an independent nation. Therefore, the United States has complete jurisdiction over its territory, including the power to bar certain races from entering the United States.[76] Next, the Court pointed to national security. "To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated."[77] An arguably legitimate reason, this rationale ignores the lack of a security concern in the *Chinese Exclusion Case*. Finally, the Court reasoned that every commu-

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American workers in mechanical jobs, hostilities between the immigrants and natives grew, causing open conflicts and disturbances of the public peace. *Id.* at 594–95.

72. *Id.* at 595. The Court mentioned that the Chinese "were generally industrious and frugal. *Id.* "Not being accompanied by families, except in rare instances, their expenses were small; and they were content with the simplest fare, such as would not suffice for our laborers and artisans." *Id.*

73. *Id.*

74. *Id.* at 603.

> As they grew in numbers each year, the people of the coast saw, or believed they saw, in the facility of immigration, and in the crowded millions of China, where population presses upon the means of subsistence, great danger that at no distant day that portion of our country would be overrun by them, unless prompt action was taken to restrict their immigration. *Id.*

75. *Id.* at 603.

76. *Chinese Exclusion Case*, 130 U.S. at 603 ("That the government of the United States, through the actions of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy.").

77. *Id.* at 606 (asserting that whether defending against invasion by a foreign country or "vast hordes of its people crowding in upon us," the federal government is charged with defending its territorial sovereignty).

nity has the right to self-definition; every community could define itself and bar others from entering the community.[78]

While one might view the plenary power doctrine as a racist outlier, the Court gleefully expanded the plenary power doctrine following the *Chinese Exclusion Case*. For example, the Court has now stated that "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens."[79] Indeed, the Court has reaffirmed the plenary power doctrine in several cases.[80] For instance, in *Nishimura Ekiu v. United States*, the Court held that, if an alien had never entered the United States, an alien's procedural due process rights equaled those rights granted by Congress or the Executive.[81] Similarly in *Shaughnessy v. United States ex rel. Mezei*, the Court upheld the government's indefinite detention of an alien in Ellis Island[82]—this despite the alien's twenty-five-year residence in the United States, his departure being due to his need to see his dying mother, and the unwillingness of any other nation to take in the alien.[83] The travesties of this doctrine are numerous. One scholar poignantly stated, "*Chinese Exclusion*—its very name is an embarrassment—must go."[84] Yet, the *Chinese Exclusion* case remains.

III. THE PLENARY POWER DOCTRINE FALLACY

Three reasons drove the Court's decision in the *Chinese Exclusion Case*. First, the Court relied on the government's sovereign powers. "Ju-

78. *Id.* at 607 (discussing an historical acceptance of a nation's right to define its citizenry).

79. Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)) (internal quotation marks omitted).

80. *See, e.g.*, Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."); Keller v. United States, 213 U.S. 138, 143–44 (1909) (reaffirming that Congress "has the power to exclude aliens," "to prescribe the terms and conditions on which they may come in," and establish regulations on sending them out); Fok Yung Yo v. United States, 185 U.S. 296, 302 (1902) (holding that the doctrine of Congress's "power to exclude or expel aliens" is firmly established); Nishimura Ekiu v. United States, 142 U.S. 651, 659–60 (1892) (stating that the "supervision of the admission of aliens into the United States may be entrusted to Congress").

81. *See Nishimura Ekiu* 142 U.S. at 660.

82. *Shaughnessy*, 345, U.S. at 215.

83. *Id.* at 218–19. "After a foreign visit to his aged and ailing mother that was prolonged by disturbed conditions of Eastern Europe, he obtained a visa for admission issued by our consul and returned to New York." *Id.* at 219.

84. Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 863 (1987) (observing an apparent unjust system of deterring immigrants from entering the United States).

risdiction over its own territory to [limit immigration] is an incident of every independent nation."[85] Second, because of the security risks inherent in immigration, the Court has refused to overturn immigration determinations made by the political branches.[86] Third, for the Court, members of the American political community can decide who else may join the American political community.[87] This portion of the Note attacks these reasons under a doctrinal lens and explains why any solution to abuses faced by aliens should incorporate CRT.

A. *Doctrinally Unsound*

First, the Court created the inherency-of-sovereignty argument from scratch. Although independent nations have jurisdiction over immigration, "[i]t is not obvious . . . that . . . in our federal state, control of immigration is a power lodged in the federal government."[88] Indeed, "[a]ll powers of government, all police powers, are inherent in nationhood, in sovereignty, but in our constitutional system most of them were not delegated to the federal government."[89] More importantly, however, the Court itself recognizes that international law begets the sovereign's plenary power over immigration.[90] Here, the Supreme Court's rationale crumbles.

International law limits sovereignty. "[W]hat is sovereignty, if not a mutual recognition by states and nations of their right to control certain matters within their jurisdiction?"[91] Yet, international law grants specific

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85. *Chinese Exclusion Case*, 130 U.S. at 603; *see also Nishimura Ekiu*, 142 U.S. at 659 ("It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.").

86. *See Chinese Exclusion Case*, 130 U.S. at 606 (asserting that, if Congress concludes the presence of aliens in the United States, particularly those aliens who are of a different race and disinclined to assimilate, poses a threat to domestic peace and security, the judiciary is bound by that decision).

87. *See id.* at 605 (describing how the government formed for and by the people must, at the people's direction, regulate the admission of foreigners). "The people have declared that in the exercise of all powers given for these objects [the federal government] is supreme. It can, then, in effecting those objects, legitimately control all individuals or governments within the American territory." *Id.*

88. Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 857 (1987).

89. *Id.*

90. *See, e.g.*, *Nishimura Ekiu*, 142 U.S. at 659 (reminding us that the Constitution has vested this power to the national government to control international relations).

91. Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The "Plenary Power" Justification for On-Going Abuses of Human Rights*, 10 ASIAN L.J. 13, 14 (2003) (arguing that true sovereignty is acquired by the interactions between states and

rights to aliens.[92] For example, aliens have rights against arbitrary detention.[93] Hence, international law would constrain the United States' sovereignty and prevent it from repeating *Shaughnessy*. But, here, one would err.

While the Supreme Court has yet to address whether current international law limits the plenary power doctrine, detained aliens have taken this argument to the Eleventh Circuit Court of Appeals. In *Garcia-Mir v. Meese*, the Eleventh Circuit Court of Appeals rejected the argument that international law could constrain the Executive's disregard for due process.[94] Other courts have rejected similar arguments.[95]

Garcia-Mir concerned the detention of Cubans who had departed from Cuba's Mariel Harbor.[96] The Eleventh Circuit Court of Appeals had previously, in *Jean v. Nelson*, held that the Attorney General had authority "to discriminate on the basis of national origin in making parole decisions,"[97] and denied that any constitutional principle prevented the government from detaining Haitians indefinitely.[98] Because cases like *Jean* and *Shaughnessy* barred the aliens from arguing that indefinite detention violated the Constitution, the Cubans that the government held indefinitely in *Garcia-Mir* had to make extraconstitutional arguments.

Noting that international law forbids arbitrary detention, the Cubans argued that the government could not indefinitely detain them.[99] But the court dismissed the argument. The Eleventh Circuit stated, "[T]he reach

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outside this context there is no legitimate meaning). "[T]he Supreme Court's justification for the exercise of plenary power is that the power is inherent in sovereignty." *Id.*

92. *See id.* (showing that although international law prohibits states from discriminating based on national origin or race, the current immigration law that the United States enforces violates this provision).

93. *See* International Covenant on Civil and Political Rights, *open for signature* Dec. 16, 1966, art. 9, ¶ 1, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm ("Everyone has the right to liberty and security of person.").

94. 788 F.2d 1446, 1454–55 (11th Cir. 1986).

95. *See, e.g.*, Oliva v. U.S. Dep't of Justice, 433 F.3d 229, 230, 235–36 (2d Cir. 2005) (discussing that, because explicit congressional action will trump customary international law, the court need not reach the merits of petitioner's claim for relief from removal from the United States as an "adult nonpermanent resident alien"); Gisbert v. U.S. Att'y Gen., 988 F.2d 1437, 1448 (5th Cir. 1993) (instructing that "because federal executive, legislative, and judicial actions supersede the application of [the] principles of international law" at issue, petitioners had no foundation on which to base their unlawful incarceration contentions).

96. Mark D. Kemple, Note, *Legal Fictions Mask Human Suffering: The Detention of the Mariel Cubans Constitutional, Statutory, International Law, and Human Considerations*, 62 S. CAL. L. REV. 1733, 1792 (1989).

97. 727 F.2d 957, 963 (11th Cir. 1984) (en banc), *aff'd as modified*, 472 U.S. 846 (1985).

98. *Id.* at 975.

99. *Garcia-Mir*, 788 F.2d at 1453.

of international law will be interdicted by a controlling judicial decision."[100] The court continued, "In *Jean v. Nelson*, we [held] . . . that even an indefinitely incarcerated alien 'could not challenge his continued detention without a hearing.'"[101] Thus, international law could not override the court's decision in *Jean*, which held that aliens held indefinitely by the government had no constitutional right to a hearing. Supreme Court precedent and *Jean* trumped international law, and the aliens had no recourse.

But, of course, the *Nishimura Ekiu*, *Jean*, and all other plenary power cases rely on the *Chinese Exclusion Case*, which relies on international law's recognition that sovereignty grants nations control over their borders. Relying on international law in the 1800s, the Court in the *Chinese Exclusion Case* held that the political branches have plenary power over immigration. The Court, then, pronounced a rule of law based on international law from the 1800s. Because it pronounced this now anachronistic rule, the courts now refuse to accept current international law, which curbs the political branches' plenary power.[102]

This argument's circularity undermines any notion that the international-law/sovereignty argument demands the plenary power doctrine. By all reason, if international law created the plenary power doctrine, international law should define the scope of the plenary power doctrine. Had the Supreme Court, in the *Chinese Exclusion Case*, *Nishimura Ekiu*, or some other immigration case, rejected the plenary power doctrine, because the Constitution limits federal agents wherever they be or because the Fifth Amendment applies to all persons, including aliens,[103] the Court

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100. *Id.* at 1455.

101. *Id.*

102. The logic here shadows the circular logic mentioned in Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

> The current legal argument runs: One who by the ingenuity of his advertising or the quality of his product has induced consumer responsiveness to a particular name, symbol, form of packaging, etc., has thereby created a thing of value; a thing of value is property; the creator of property is entitled to protection against third parties who seek to deprive him of his property. . . .
>
> The vicious circle inherent in this reasoning is plain. It purports to base legal protection upon economic value, when, as a matter of actual fact, the economic value of a sales device depends upon the extent to which it will be legally protected. If commercial exploitation of the world "Palmolive" is not restricted to a single firm, the word will be of no more economic value to any particular firm than a convenient size, shape, mode of packing, or manner of advertising, common in the trade. Not being of economic value to any particular firm, the word would be regarded by courts as "not property," and no injunction would be issued. *Id.* at 815.

103. U.S. CONST. amend. V. The text states that "[n]o *person* shall . . . be deprived of life, liberty, or property, without due process of law." *Id.* (emphasis added).

would have debunked the international law argument. Instead, the government indefinitely holds aliens because of an ancient norm. Having originally relied on international law, the courts should now look to international law to define the plenary power doctrine's scope.

Second, the security argument lacks all merit. As a practical matter, no tangible security interest existed in the *Chinese Exclusion Case*. The Court attempted to make a national security case by stating, "It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us."[104] This argument lacks merit. At this time, the great majority of immigrants to the United States came from Europe.[105] Yet, the Chinese Exclusion Act excluded only the Chinese. No "vast hordes" intended to invade the United States. Nevertheless, Congress excluded Asians, not Europeans, and the Court's language reflects more the racist attitudes of many Whites than it does a national security threat.[106]

Circuit courts and the government, in their attempts to bolster the plenary power doctrine, have created a dictator hypothetical, whereby an evil dictator decides to open her border and, because the plenary power doctrine does not exist, forces the United States to incorporate all of the dictator's exiles.[107] For numerous reasons, the government's argument fails.

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104. *Chinese Exclusion Case*, 130 U.S. at 606.

105. MICHAEL C. LEMAY, GUARDING THE GATES: IMMIGRATION AND NATIONAL SECURITY 40 fig.2.1 (2006).

106. *See Chinese Exclusion Case*, 130 U.S. at 606 (describing large-scale immigration of Chinese as an invasion of "vast hordes" of a foreign people "crowding in upon" Americans).

> If . . . the government of the United States . . . considers the presence of foreigners of a *different race in this country*, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subject. *Id.* (emphasis added).

Indeed, as Professor Natsu Taylor Saito has noted, this security rationale implicitly assumes "that the citizenry need not worry about . . . this exercise of unlimited power [by the political branches] because Americans are protected by such actions." Natsu Taylor Saito, *Beyond the Citizen/Alien Dichotomy: Liberty, Security, and the Exercise of Plenary Power*, 14 TEMP. POL. & CIV. RTS. L. REV. 389, 401 (2005). Saito, however, finds this argument to be "patently false," unless the definition of who is considered an "American" is confined to not only citizenship, "but by race, religion, national origin, economic class, and a willingness to support the status quo." *Id.*

107. *See, e.g.*, *Jean*, 727 F.2d at 975 ("A foreign leader could eventually compel us to grant physical admission via parole to any aliens he wished by the simple expedient of sending them here and then refusing to take them back."); Chavez-Rivas v. Olsen, 207 F. Supp. 2d 326, 338 (D.N.J. 2002) ("Without continuing detention, the INS claims, overseas

Initially, the hypothetical seems unrealistic. For the hypothetical to work, the despot must control a nearby government. The President of North Korea, Kim Jong-il, for example, could never try such a ploy. The hypothetical mass exodus would have no means of reaching the United States from North Korea. This leaves a handful of nations whereby this scenario can work: Canada, Mexico, Haiti, Cuba, and the Dominican Republic. It seems unlikely that these countries would undergo a campaign to topple the United States government through immigration. Additionally, an incentive already exists for despots to send huge waves of aliens to the United States: It costs $30,000 per year to indefinitely detain an alien.[108]

Lastly, a despot likely would not care whether the United States has a benevolent, malevolent, or neutral policy.[109] The notion that a rogue dictator would only release citizens she no longer wanted only when the United States has a humane policy internally contradicts itself. The dictator, evil enough to expel numerous people, lacks the wickedness to do so when the United States would treat the exodus members inhumanely.

While the Court's national security reasoning in the *Chinese Exclusion Case* seems weak, national security, abstractly, exists as a plausible rationale. However, doctrinally, the national security rationale fails to overcome the need for constitutional protection. For instance, in the realm of military matters, the courts give the political branches a latitude similar to the latitude they give the political branches in immigration matters. "Although 'military necessity' rather than the plenary power doctrine is usually invoked, the powers claimed by the government and the courts' rationale for refusing to impose otherwise applicable constitutional limitations are virtually identical."[110] Yet, the Supreme Court has recently upheld constitutional limits upon the political branches even in times of military necessity.

For example, after September 11, 2001, the United States considers itself to be at war with terrorism. As part of this effort, the United States imprisoned 700 men in Guantánamo Bay, Cuba.[111] The United States

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dictators would use the United States as dumping ground for their criminals and malcontents.").

108. *See* Eliot Walker, Note, *Safe Harbor: Is* Clark v. Martinez *the End of the Voyage of the Mariel?*, 39 CORNELL INT'L L.J. 121, 156 (2006) (considering the government's public policy argument that relaxing U.S. immigration policy would provide an incentive for rogue nations to dump their undesired citizens into the United States).

109. *Id.*

110. NATSU TAYLOR SAITO, FROM CHINESE EXCLUSION TO GUANTÁNAMO BAY: PLENARY POWER AND THE PREROGATIVE STATE 51 (2007).

111. *Id.* at 160.

brought these men to Cuba while blindfolded, shackled, and drugged.[112] Though the United States has a prima facie valid reason for arresting and detaining these men—these men allegedly compose terrorists of the highest order—and although terrorists have attacked the United States, the Supreme Court has found the indefinite detention of these men troubling. In *Hamdi v. Rumsfeld*, the Supreme Court held that "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker."[113] Applying the *Mathews v. Eldridge*[114] due process balancing test, the Court required that citizens receive notice and a fair hearing to rebut the government's claims.[115] But what about military necessity? "[A] state of war is not a blank check . . . ."[116]

Similarly, in *Hamdan v. Rumsfeld*, the Court upheld an enemy combatant's challenge to President Bush's attempts to prosecute him via a military commission.[117] Despite the government's claim that Hamdan committed conspiracy and that courts should await the outcomes of on going military trials, the Court considered the merits of Hamdan's challenge.[118] Notably, the Court assumed the truth of the charges against Hamdan and assumed that Hamdan constituted a dangerous individual.[119] Still, the Court held that the military commission created by the Executive could not hold trial against Hamdan.[120]

Finally, *Boumediene v. Bush* concerned aliens categorized as enemy combatants.[121] Unlike *Hamdan* and *Hamdi*, *Boumediene* concerned not just the executive branch's wartime power but concerned the legislative branch's power as well. Congress passed a law that restricted the detained aliens' ability to seek judicial review.[122] The law, the Court acknowledged, denied courts jurisdiction over habeas corpus petitions made by the detained aliens.[123] Yet, the Court first indicated that the geographical limits of the United States do not limit the Constitution.

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112. *Id.*

113. 542 U.S. 507, 509 (2004).

114. 424 U.S. 319, 334–35 (1976).

115. Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004).

116. *Id.* at 536.

117. 548 U.S. 557, 567 (2006).

118. *Id.* at 584–85 (describing the Court's decision to review Hamdan's case despite the President's request to wait until other Guantanamo Bay cases were heard).

119. *Id.* at 635 (focusing on the Court's acceptance of the President's claim that Hamdan was a dangerous person).

120. *Id.* at 613.

121. 128 S. Ct. 2229, 2240 (2008).

122. *Id.*

123. *Id.* at 2242.

Instead, the Constitution follows U.S. officials.[124] Then, the Court found Congress's substituted procedures an inadequate substitute for the writ of habeas corpus.[125]

Hamdi, *Hamdan*, and *Boumediene* represent three instances where the Court imposed its will upon the political branches notwithstanding the national security interests involved. While national security interests existed, the Court used lofty language to demolish the national security interests and revere the liberty interests involved. For Justice O'Connor, "[i]t is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."[126] *Boumediene* contained its own lofty rhetoric to dismiss the national security interests invoked by the political branches. "Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers."[127] The Court continued, "The laws and Constitution are designed to survive, and remain in force, in extraordinary times."[128]

The Court's ability to apply constitutional principles when actual threats might exist but to rebuke the application of those very same constitutional principles when no actual threat exists causes alarm.[129] If courts can balance the national security interests on the war on terror, they can a fortiori balance national security interests when cases involve no concrete national security interests.[130]

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124. *Id.* at 2254–55.

> [T]he real issue in the *Insular Cases* was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which ones of its provisions were applicable by way of limitation upon the exercise of the executive and legislative power in dealing with new conditions and requirements. *Id.* (quoting *Balzac*, 258 U.S. at 312).

"The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply." *Id.* at 2259.

125. *Id.* at 2240.

126. *Hamdi*, 542 U.S. at 532.

127. *Boumediene*, 128 S. Ct. at 2277.

128. *Id.*

129. A similar argument has been made comparing the foreign affairs power to the plenary power doctrine. *See, e.g.*, Richard F. Hahn, Note, *Constitutional Limits on the Power To Exclude Aliens*, 82 COLUM. L. REV. 957, 973–74 (1982) (comparing the Court's willingness to apply the Constitution to the government in foreign affair-power cases with its unwillingness to apply the Constitution in plenary power cases).

130. A stark difference exists in the Court's willingness to look beyond its deference in these two contexts. A possible explanation resides in the history of the doctrines. Though people attack cases like the *Chinese Exclusion Case*, which concerns the plenary power doctrine, and cases like *Korematsu v. United States*, 323 U.S. 214 (1944), which con-

Third, the Court's reliance on a community's ability to define itself begs the question. For instance, in the *Chinese Exclusion Case*, the Court noted, "Every society possesses the undoubted right to determine who shall compose its members, and it is exercised by all nations, both in peace and war."[131] Even assuming that a society can select what members enter, and what members cannot enter, the political community,[132] this rationale ignores that the U.S. community has already created a framework within which it can act.

The Constitution is the U.S. government's founding charter. The Constitution specifically states that "[n]o *person* shall . . . be deprived of life, liberty, or property, without due process of law."[133] These are the rules by which the political community constrained itself. The words do not limit the application of this limit to citizens or persons inside of the United States.

Certainly, the enclosed political community rationale makes sense only if the U.S. political community passed the Bill of Rights to limit the enumerated powers granted to the government, but not to limit those powers not granted to the government in the Constitution. To the enclosed political community rationale, because the Constitution never explicitly grants the federal government the power to restrict immigration, the Bill of Rights do not constrain this power. But this assumption seems dubious. "The constitutional fathers were . . . men whose thinking had been influenced by natural law theory."[134] Because of the natural law ideological background, the Bill of Rights represents a recognition of rights that pre-

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cern the military necessity doctrine, the plenary power doctrine concerns those most helpless in society—aliens. Further, American society refuses entrance to the aliens to which the plenary power doctrine applies. In contrast, the military necessity doctrine can affect U.S. citizens. Even if among the more helpless members of the United States, citizens can critique the military necessity doctrine after the fact. Thus, if citizens, after having their rights violated because of military necessity, debunk the military necessity principle as nonsense, military necessity cases undermine the Court's legacy. *Cf.* Geoffrey R. Stone, *National Security v. Civil Liberties*, 95 CAL. L. REV. 2203, 2209 (2007) ("The Justices are acutely aware of the Court's past failures, and no Justice wants his or her legacy to be tainted by the next *Schenck*, *Korematsu*, or *Dennis*."). This likely forces the Justices to scrutinize the government's use of the military necessity doctrine. *Id.* The removed aliens, by contrast, cannot participate in U.S. democracy and attack the legacy of the court. Therefore, the Court has no impetus to scrutinize the plenary power doctrine.

131. *Chinese Exclusion Case*, 130 U.S. at 607.

132. *See* PETER C. MEILAENDER, TOWARD A THEORY OF IMMIGRATION (2001) (arguing that positions taken by countries on immigration relate to the underlying views of the political community).

133. U.S. CONST. amend. V (emphasis added).

134. Richard F. Hahn, Note, *Constitutional Limits on the Power to Exclude Aliens*, 82 COLUM. L. REV. 957, 972 (1982) (asserting a broad interpretation of the Bill of Rights under the philosophical implications of natural law). "Properly understood, the Bill [of

date government and rights that all individuals hold.[135] The Bill of Rights, then, limits all of our government's actions. These limitations constrain our officials. "[T]he Supreme Court has held that the Bill of Rights applies to foreign as well as domestic affairs, in war as in peace, to aliens as well as to citizens, abroad as well as home."[136]

As a political community, the U.S. citizenry limited the powers of its government. Therefore, if the political community wished to indefinitely detain aliens, it should not have granted all persons due process rights.

B. *The Need for Critical Race Theory*

As discussed above, the government, the population, and businesses have used immigration to obtain cheap labor when necessary and discard the cheap labor when the economy sputters. Historically, the government discarded the cheap labor in racist, nativist terms. These actions show how the plenary power doctrine harms. But, while discarding the plenary power doctrine might prevent the government from passing another version of the Chinese Exclusion Act, "the modern immigration laws for the most part are facially race-neutral."[137] And, under the standard imposed by the Supreme Court in *Washington v. Davis*, a law violates the Equal Protection Clause only if the law *intends* to discriminate on the basis of race.[138]

Rights] is not an affirmative grant of rights, but simply an explicit recognition of those rights retained by the individual." *Id.*

135. *See id.* (implying that the rights asserted in the Constitution pre-date the execution of the document). "[T]he Supreme Court's opinions reflect this conception of the Bill of Rights and its scope. Aside from exclusion and deportation cases, the Court has never refused to balance individual rights against exercises of the government's foreign affairs power." *Id.* at 973.

136. Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 863 (1987).

137. Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525, 532. "Despite the façade of neutrality, these laws have unmistakably disparate impacts on immigrants of color from developing nations." *Id.*; *see* George A. Martínez, *Race and Immigration Law: A Paradigm Shift?*, 2000 U. ILL. L. REV. 517, 518 ("[I]t takes some effort to decode apparently race-neutral immigration laws to reveal their hidden racial implications.").

138. 426 U.S. 229, 240–41 (1976) (describing the necessary elements that must be present in order for a law to violate the Equal Protection Clause). The Supreme Court has historically adhered to the principal that in order to be racially discriminatory, a law must "ultimately be traced to a racially discriminatory purpose." *Id.* at 240.

Although the analysis above highlights the weakness of the Supreme Court's plenary power logic, it cannot, alone, overcome the problems raised in immigration law.[139] One author elaborates as to this conflict:

> The solution to the human rights problems created by the exercise of plenary power is often presumed to be the extension of full constitutional protections to the subject groups; in other words, the assimilation of the Other [non-citizens] into the mainstream of the body politic. The legal system nominally took this route with respect to African-Americans, over whom complete plenary power was authorized by law until the Reconstruction amendments. However, as Judge Higginbotham and many other scholars have documented, formal legal equality has not for the most part resulted in the actual protection of African-American human rights.[140]

The same criticism exists against any doctrinal change in the plenary power doctrine. Given *Washington*, even a dramatic shift in doctrine would likely give the government enough room to discriminate on race or national origin.

Critical Race Theory applies in this situation. "Critical Race theorists strive to dislodge the elements of race and racial power entrenched in doctrinal categories."[141] CRT can especially enlighten in the immigration context.[142] CRT offers at least two useful tools. CRT offers insight into "racism" beyond that offered by intentional discrimination. As such, CRT fights to overturn *Washington*. Further, CRT, through White privilege, can attempt to limit how the political community decides to define

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139. For criticism of *Washington*'s intent requirement, see Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 36–40, 43–47 (1991), which distinguishes between formal race, status race, and historical race and argues that formal race strict scrutiny undermines the government's efforts to end systemic discrimination; and Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323, 328–40 (1987), which argues that the intent requirement ignores the effect systematic and cultural notions of race play on individuals' consciousness.

140. Natsu Taylor Saito, *Asserting Plenary Power Over the "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL'Y REV. 427, 432 (2002).

141. Anthony V. Alfieri, *Black and White*, 10 LA RAZA L.J. 561, 579 (1998) (reviewing CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995)).

142. *See generally* Stephen Shie-Wei Fan, Note, *Immigration Law and the Promise of Critical Race Theory: Opening the Academy to the Voices of Aliens and Immigrants*, 97 COLUM. L. REV. 1202 (1997) (espousing the importance of taking a Critical Race Theory approach to the problems raised by immigration law). "[C]ontemporary immigration and alienage law is largely bound by the issues of race, and reasons that immigration scholars could better account for the complex intersections of race, alienage, and other identity characteristics . . . ." *Id.*

itself. Specifically, in the immigration context, the U.S. political community has the analogy of White privilege. The community obtains privilege from its abuse of the immigration system, but then assumes no privilege exists.

Washington fails to understand racism. Racism is a product of society,[143] not of individuals. By placing the focus on intent, the Court ignores unconscious racist impulses. Every member of society has racist tendencies gained by cultural assimilation. "Even if a child is not told that [B]lacks are inferior, he learns that lesson by observing the behavior of others."[144] The constant stigmatizing of aliens makes it seem normal to stigmatize aliens. Society's failure to recognize accomplishments by aliens diminishes their role in improving the United States. Because of *Washington*, society creates discriminatory outcomes without any explanation for the outcome. No one intentionally discriminated, so society assumes racism played no role in the allocation of results.

Take, for example, the exodus from Haiti in the early 1980s. The law grants the Attorney General wide discretion in granting aliens parole.[145] The Attorney General's discretion, in light of *Washington*, makes it impossible to prove intentional discrimination. Consequently, the Haitians who arrived in the United States in the early 1980s faced discrimination.[146] Yet, no government official sat behind a desk and intentionally

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143. *See* Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659, 1659 (1995) (discussing how segregation is both a "cause and a product" of American society). "The concept of race has no natural truth, no core content or meaning other than those meanings created in a social system of White privilege and racist domination." *Id.*

144. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 135, 323 (1987).

145. *See* 8 U.S.C. § 1182(d)(5)(A) (2006). Parole frees the alien from detention without legally admitting the alien to the United States.

> The Attorney General may, except as provided in subparagraph (B) or in section 1184(f) of this title, in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States. *Id.*

146. *See* Richard F. Hahn, Note, *Constitutional Limits on the Power to Exclude Aliens*, 82 COLUM. L. REV. 957, 991 (1982). Whereas other groups were allowed to enter the country under parole, Haitians where denied upon arrival. *Id.* "[T]he INS has denied Haitian asylum claims virtually en masse. Earlier groups met with far more generous treatment." *Id.*

decided to discriminate against Haitian aliens. Nonetheless, race likely played a role in governmental officials' decisions.[147]

Created by *Washington* and current Equal Protection Clause jurisprudence, this discrepancy represents an incorrect assumption about reality. Although intentional discrimination constitutes a heinous act, discrimination far exceeds the narrow boundaries of intentional discrimination. CRT can underscore this truth and topple the *Washington* analysis.

Moreover, given the interest-convergence principle and its corollary, the idea that the majority will stop discriminating, exploiting, and harassing aliens lacks substance. Like the transparency phenomenon, whereby Whites never notice that they too have color and stereotypical characteristics attributed to them because of their color,[148] the political-community argument ignores privilege. The U.S. population carries undeniable privilege, and part of this privilege came from its usage of cheap labor in the form of immigration. Nonetheless, the political community argument assumes the status quo to be untethered from the past. Thus, the U.S. citizenry can mold, shape, and control immigration in whatever way it seeks, for the citizenry has the right to define who can be part of the political community.

Simply because the citizenry cannot see its privilege, it does not follow that the privilege does not exist.[149] "One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return."[150] The citizenry, under the plenary power doctrine, has obtained cheap labor when necessary throughout the United States' history, thereby getting services for the least possible return. Whenever the immigration threatened the efforts of the elite to get the most for their services, they closed the immigration doors.

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147. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV., 317, 330 (1987) (stating that "[r]acism is in large part a product of the unconscious."). "It arises from the assumptions we have learned to make about the world, ourselves, and others as well as from the patterns of our fundamental social activities." *Id.* "We attach significance to race even when we are not aware we are doing so." *Id.*

148. *See, e.g.*, Barbara J. Flagg, *"Was Blind, but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993) ("The most striking characteristic of Whites' consciousness of whiteness is that most of the time we don't have any."); Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659, 1659 (1995) ("Whites have difficulty perceiving Whiteness, both because of its cultural prevalence and because of its cultural dominance.").

149. *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1710–14 (1993) (discussing the benefits of Whiteness gained by unknowing Whites).

150. Vegelahn v. Gutner, 44 N.E. 1077, 1081 (Mass. 1896) (Holmes, J., dissenting).

This privilege likely makes any doctrinal change unreliable. A doctrinal shift, even if seismic, likely will not cure any true discrimination faced by incoming aliens. *Washington* exemplifies White privilege.[151] Thus, even if the courts replace the plenary power doctrine with some other more lenient doctrine, CRT must play a critical role. By comparing the privilege gained by the citizenry from immigration law with the White privilege gained by Whites, CRT can, again, undermine the plenary power doctrine. By dispelling "the idea that immigration policies have nothing to do with race,"[152] CRT can play a major role in reshaping immigration law's future.

IV. CONCLUSION

The courts, via the plenary power doctrine, have shirked their responsibility to uphold the Constitution. Still, as this Note has shown, the courts never needed to do such a thing. The courts' reasoning behind the plenary power doctrine lacks substance and coherency.

The doctrine's alleged father, international law, would now limit its scope. Because the Supreme Court, over 100 years ago, scribbled the international law of that time on paper, courts cannot impose international law's current restrictions upon the doctrine. Furthermore, the national security rationale lacks coherency. Even in cases of alleged terrorism, the courts have applied the Constitution to the political branches of government. Where the United States has, at least, a prima facie case for invoking national security interests, the courts imposes constitutional limits on the political branches. In contrast, where a wide, horrid history of discrimination that lacks any national security concerns appears, the courts dogmatically refuse to apply the Constitution upon the political branches.

Furthermore, *Washington* undermines a doctrinal solution to the plenary power doctrine. Nonetheless, some doctrinal solutions may apply. The Court, like in *Hamdi*, can apply the *Mathews* balancing test to aliens. At the very least, this removes the possibility of indefinite detention, since the Court has recognized freedom from detention as the elemental liberty interest.[153] No one claims the *Mathews* balancing test the apotheosis of rights protection. Under the *Mathews* balancing test, courts bal-

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151. *See* Sylvia A. Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603, 618 (1999) ("Our anti-discrimination law itself embodies a form of White privilege.").

152. Ruben J. Garcia, Comment, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118, 143 (1995).

153. *See Hamdi*, 542 U.S. at 529 (showing the Court's reliance on previous decisions denying the government the ability to hold people for an undisclosed, undetermined amount of time).

ance three factors: (1) the individual right at stake, (2) the risk of erroneous deprivation of the right and the value of extra safeguards, and (3) the state interest.[154] Since the balance places the right of one individual against the collective interest of the state, individuals have few hopes of winning any concrete procedural safeguards.[155] Besides token additional safeguards or extreme circumstances, few situations exist where the right of an individual overcomes the burdens placed on society as to demand substantial procedural safeguards. These risks exponentially increase when courts must balance the burdens of the U.S. political community with the rights of aliens. History shows that the United States' public quickly and easily disregards aliens' rights. Thus, *Mathews*, applied to aliens, might give some aid to aliens, but *Mathews* does not suffice.

Doctrinally, another approach offers a solution. The Supreme Court has shown the mettle to strike down laws stemming from hate. Three cases exemplify this approach. For example, in *Reitman v. Mulkey*, California passed an amendment to its constitution that barred the state government from prohibiting racial discrimination in the housing market.[156] The Supreme Court struck down the amendment as a violation of the Fourteenth Amendment.[157] Similarly, *Romer v. Evans* concerned a Colorado constitutional amendment that prevented local governments from passing laws prohibiting discrimination based on sexual orientation.[158] The Court struck down the amendment.[159] Lastly, in *Plyler v. Doe*, Texas

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154. *E.g.*, Ingraham v. Wright, 430 U.S. 651, 675 (1977) (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

155. *See, e.g.*, Van Harken v. City of Chicago, 103 F.3d 1346, 1351 (7th Cir. 1997) (applying a cost-benefit analysis to procedural safeguards). Judge Posner gives us an exemplary interplay of the state interest against the interest of an individual. *Id.* In *Van Harken*, Posner noted that, to produce extra safeguards in traffic violation cases, Chicago needed the equivalent of sixty-seven extra full-time police officers. *Id.* Posner found the individual rights could not overcome such a high toll on the city. *Id.* at 1352.

156. 387 U.S. 369, 370–374 (1967).

157. *Id.*

158. 517 U.S. 620, 623–24 (1996). The law challenged in the case was known as Amendment 2, the designation it was given when it was submitted to Colorado voters. *Id.* at 623. Amendment 2 prohibited "all legislative, executive or judicial action at any level of state or local government" that was designed to protect homosexuals. *Id.* at 624.

159. *Id.* at 626. The Court held that Amendment 2 violated the Equal Protection Clause of the Fourteenth Amendment because the state had no legitimate interest. *Id.* at 635. Amendment 2 denied homosexual's legal protection from discrimination, and it prohibited restoration of protective laws and policies. *Id.* at 627. As a result, Amendment 2 classified homosexuals not in furtherance of a state interest but to make homosexuals unequal to everyone else. *Id.* at 635.

denied undocumented aliens' children free public education.[160] The Court concluded "that the illegal aliens . . . in these cases may claim the benefit of the Fourteenth Amendment's guarantee of equal protection"[161] and struck down the Texas law as a violation of the Fourteenth Amendment.[162] While complex cases, the cases do have a unifying theme: Courts will strike down laws and amendments to state constitutions that harass groups because of animosity.[163] Therefore, if the plenary power doctrine dies, the courts might strike down immigration laws based upon animosity. Nevertheless, the Court rarely uses the anti-animosity principle that links *Reitman*, *Romer*, and *Plyler*.

In reality, the only possible hope to overcome the abuses faced by aliens is to highlight the abuses faced by aliens. Only when courts and the public understand that this nation mistreats aliens will aliens receive a modicum of justice. Thus, advocates must teach the immigration analogy of "White privilege" and fully explicate the interest-convergence principle. The struggle to end discrimination against aliens also needs the end of discrimination against other discriminated groups.[164] *Washington*'s simplistic view of racism must also fall.

In short, the plenary power doctrine cements a racist, nativist structure whereby the political branches can advantageously increase cheap labor when U.S. society needs cheap goods. However, when the economy declines, the government simply enforces its immigration laws and removes the aliens. Because of the plenary power doctrine, advocates for aliens have few options. Advocates can make moral claims for immigration reform[165] or can make arguments based on national self-interest,[166] but this

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160. 457 U.S. 202, 205 (1982). The Texas legislature revised its education laws in May 1975 to prohibit school districts from receiving state funds to educate children of undocumented aliens and to allow the school districts to deny these children enrollment. *Id.*

161. *Id.* at 215.

162. *Id.* at 230.

163. *See* Ronald J. Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of* Smith, 102 Nw. U. L. Rev. 1189, 1264–65 (2008) (discussing the Court's anti-bias motivation in *Plyler* and *Romer*). "[T]he Supreme Court has required the government to offer the actual reason for the enactment and to establish that the government's purpose was actually advanced by the application of the law on the facts presented." *Id.* at 1265.

164. *See* Francisco Valdes, *Outsider Scholars, Critical Race Theory, and "OutCrit" Perspectivity: Postsubordination Vision as Jurisprudential Method*, *in* Crossroads, Directions, and a New Critical Race Theory 399, 399 (Francisco Valdes et al. eds., 2002) (urging coalitions of "OutCrit" scholars to reach a post subordination world).

165. *See, e.g.*, Bill Ong Hing, Deporting Our Souls: Values, Morality, and Immigration Policy 164–215 (2006) (arguing that the United States should consider the moral consequences of its immigration policies).

166. *See, e.g.*, Freddy Funes, Note, *Removal of Central American Gang Members: How Immigration Laws Fail to Reflect Global Reality*, 63 U. Miami L. Rev. 301 (2008)

constitutes an unnecessary approach. The Constitution should apply to aliens. And, although this application to aliens leads to minimum relief, the relief is a victory. Beyond protection from the United States Constitution, advocates should embrace the tools given by Critical Race Theory. When they do, a long struggle will follow—overturning *Washington* and overcoming formalistic notions of "equality" will not come easily. But, at least, a tangible struggle there will be.

(arguing that the United States' massive removal of gang members to Central America harms the United States' interest).